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No. 94-2064

In The

Supreme Court of the United States

October Term, 1995

PAUL PFINGST, District Attorney of
San Diego County, California,

Cross-Petitioner,

v.

SYCUAN BAND OF MISSION INDIANS, *et al.*,

Cross-Respondents.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Attorney of San Diego County have jurisdiction to prosecute non-Indian agents of the Sycuan, Barona, and Viejas Tribes for slot machine gambling on Indian lands in violation of Cal. Pen. Code § 330.1, when the conduct was sponsored by the Tribes in contravention of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710(d)(1)(B), (C)?

2. Did the district court have jurisdiction to interdict pending state criminal proceedings, on petition of third-party Indian Tribes, when the state court prosecutions did not interfere with any federal prosecution and furthered the congressional purpose of limiting class III gaming on Indian lands to only permissible gaming activities that are regulated by a tribal-state compact?

LIST OF PARTIES TO THE PROCEEDING

Paul Pfingst, District Attorney of San Diego County, California[1]
Sycuan Band of Mission Indians
Barona Band of Mission Indians
Viejas Band of Mission Indians
Jim Roache, former Sheriff of San Diego County, California

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[1] When the proceedings below were initiated against the District Attorney of San Diego County, the name of the incumbent was Edwin L. Miller. Pursuant to Sup.Ct.R. 35.3, Mr. Miller's successor in office, Paul Pfingst, is substituted as a party herein.

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"U.S. Attorney and tribes OK gaming truce," *The San Diego Union-Tribune*, p. A-1 (July 1, 1994) 18

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JURISDICTION OF THE COURTS BELOW

Plaintiff and petitioner Indian Tribes invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, and 1362, alleging claims arising under 42 U.S.C. § 1983 and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* Jurisdiction under these sections was not disputed in the district court; however the District Attorney argued that, as a jurisdictional matter, dismissal of the complaints was required pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The District Attorney also argued that the district court lacked jurisdiction to enjoin the state court proceedings under 18 U.S.C. § 2283. Both jurisdictional defenses were rejected by the courts below. Pet. Appx. A-12 – A-14, B-20 - 23, B-26.

In the Court of Appeals, the District Attorney argued that the Tribes could not base subject matter jurisdiction on claims arising under 42 U.S.C. § 1983, since the Tribes were grounding their claim on an alleged violation of sovereignty and, to that extent, could not be a "person" for purposes of bringing suit under the Civil Rights Act. The Court of Appeals declined to address the point, finding that the district court had jurisdiction under 28 U.S.C. § 1331 for the reason that "the case clearly arises under federal law, be it IGRA or the federal common law of Indian affairs. . . . " Pet. Appx. A-7.

In this Court,[2] the District Attorney contends that the district was without subject matter jurisdiction for lack of

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[2] Lack of jurisdiction may be raised at any stage of the proceedings. *See, Renne v. Geary*, 501 U.S. 312 (1991).

a justiciable controversy within the meaning of Article III of the Constitution.

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Paul Pfingst, District Attorney of San Diego County, California, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. Cross-Petitioner does not seek review of that portion of the court's judgment finding that electronic gambling devices seized from the Sycuan Reservation constitute class III gaming. Cross-Petitioner prays that the Writ issue on this Cross-Petition whether or not a Writ issues on Petition of the Sycuan Band of Mission Indians in this matter.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

. . . .

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under 25 U.S.C. § 2710(d)(8) that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under 25 U.S.C. § 2710(d)(8), or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

25 U.S.C. § 2701. Congressional findings

The Congress finds that –

. . . .

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2710. Tribal Gaming Ordinances

. . . .

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

. . . .

(B) located in a State that permits such gaming for any purpose by any person, organizations, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

. . . .

28 U.S.C. § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

OPINIONS BELOW

Cross-Petitioner adopts the descriptions set forth at page 2 of the Petition. In this Cross-Petition, references to the decisions of the courts below will be by citation to pages of the Appendix accompanying the original Petition (Pet. Appx. ___).

JURISDICTIONAL STATEMENT

Cross-petitioner adopts the statement of this Court's jurisdiction set forth at page 2 of the Petition.

Cross-petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

SUMMARY OF FACTS

In the Fall of 1991, three California Indian Tribes installed in their casinos and offered to their patrons gambling devices that constitute slot machines[3] prohibited under the California Penal Code.[4] Pursuant to Public Law 280, 18 U.S.C. § 1162(a), law enforcement officials from San Diego County seized the machines. Pet. Appx. I-4 – I-5. Following the seizure, misdemeanor prosecutions were commenced against non-Indian management officials of the casinos.[5]

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[3] It was never seriously disputed by the Tribes that, if permitted to do so, the District Attorney could prove that the confiscated devices did, in fact, constitute "slot machines" within the meaning of Cal. Pen. Code § 330.1. The Tribes did allege that the devices constitute merely "technologic aids" to the play of *class II* games, *see* 25 U.S.C. § 2703(7)(A)(i), rather than "electronic or electromechanical facsimiles of any game or chance or slot machines of any kind," which constitute *class III* gaming under IGRA. 25 U.S.C. § 2703(7)(B)(ii). Only the Sycuan Band, however, sought summary judgment on that argument, and that effort was unsuccessful. Pet. Appx. D, E. By stipulation of the parties, analogous claims of the Barona and Viejas Bands, were dismissed. CR 110.

[4] Slot machines are prohibited by Cal. Pen. Code §§ 330a, 330b, and 330.1.

[5] There was no dispute that state criminal defendants James Trant, Emmett Munley, or Helen Chase are not Indian.

The Tribes sued to enjoin future enforcement of Cal. Pen. Code § 330.1 on their Indian lands and to interdict the pending state criminal prosecutions. The district court granted the Tribes' motion for summary judgment on their claim that the county officials lacked jurisdiction under Public Law 280 and under Section 23 of the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. § 1166(d), to seize the gambling devices and to initiate criminal prosecutions. Pet. Appx. B-1 – B-2. The court issued a permanent injunction against the District Attorney, but declined to issue an injunction against the Sheriff. Pet. Appx. B-19 – B-20, C-2 – C-3. By subsequent stipulation of the parties, the action against Sheriff Roache was dismissed, Pet. Appx. H, and an appeal was taken by the District Attorney alone.

The Court of Appeals affirmed the judgment of the district court both as to the Class III classification of Sycuan's Autotab Model 101, Pet. Appx. A-14 – A-20, and

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There is an unresolved question whether criminal proceedings were actually ever initiated against Viejas Tribal Chairman Anthony Pico, a member of the Viejas Tribe and the only Indian alleged to be among the criminal defendants. The district court stated that criminal proceedings were initiated against Mr. Pico, Pet. Appx. I-5; however, in the Court of Appeals, the District Attorney sought to correct this factual error by submitting a declaration and requesting the appellate court to take judicial notice of the fact that criminal proceedings had never been commenced against Mr. Pico. See Declaration of William J. Collins attached hereto as an Appendix. Although the Viejas Tribe did not dispute the District Attorney's assertion of the true facts about the prosecution of its chairman, the Tribe did oppose the request for judicial notice, and that request was summarily denied. The opinion of the Court of Appeals states that criminal prosecutions were commenced against "four persons" of unspecified identity. Pet. Appx. A-6.

as to the jurisdiction of the District Attorney to prosecute for violation of the state slot machine prohibitions. Pet. Appx. A-8 – A-12.

REASONS FOR GRANTING THE WRIT

A. The Writ Should Issue To Determine Whether, Under The Facts In This Case, California Is Preempted By 18 U.S.C. § 1166(d) From Enforcing Cal. Pen. Code § 330.1 Against Slot Machine Gambling On Indian Lands

The Court of Appeals held that, by its terms, 18 U.S.C. § 1166(d) divests California of jurisdiction under Public Law 280 to enforce its gambling laws against the Tribes here. Pet. Appx. A-11 – A-12. IGRA does not *expressly* repeal Public Law 280, and the District Attorney argued below that, under recognized principles of statutory construction, no *implied* repeal should be found if the two statutes could be harmonized. *See United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991); *see also, Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986). The Ninth Circuit did not opine upon the compatibility of the two statutes.

Public Law 280 is not *sine qua non* to California's jurisdiction over slot machine gambling by Indian Tribes. This Court has never recognized "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-215 (1987) (hereafter, *Cabazon*).

In respect to gambling, Congress recognizes an exclusive right in Indian Tribes to regulate gaming activity

only "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis added).[6] Accordingly, when Tribes do not have the exclusive right to regulate a gaming activity, the exercise of a State's jurisdiction to control the activity should be subject to a balancing of federal, tribal, and state interests. *Cabazon*, at 214-222.

The District Attorney respectfully submits that, unlike bingo, slot machine gambling is *categorically* prohibited in California and is, therefore, prohibited in the State "as a matter of criminal law and public policy." Cal. Pen. Code §§ 330a, 330b, 330.1; *cf.*, Cal. Pen. Code § 326.5 [charity bingo]. Since Congress has not recognized a right in California Indian Tribes to regulate prohibited slot machine gambling, 25 U.S.C. § 2701(5), it is not necessary to read 18 U.S.C. § 1166(d) as totally ousting California of jurisdiction to enforce Cal. Pen. Code § 330.1 against the Tribes or tribal members – whether pursuant to Public Law 280 or inherent state police powers. Stated otherwise, federal jurisdiction under 18 U.S.C. § 1166(d) is only incompatible with state enforcement of state gambling laws in those cases where exclusivity of federal criminal jurisdiction reflects a congressionally recognized *exclusive* tribal right to regulate the disputed gaming activity. Where, under the terms of 25 U.S.C. § 2701(5), a

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[6] In practical effect, the Tribes' exclusive "right to regulate" class III gaming amounts to the right of the Tribe to determine to permit class III gaming at all. For the actual *regulation* of class III gaming is a matter to be worked out between the Tribe and the State in a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C).

Tribe has no regulatory jurisdiction at all or, at best, only a right to regulate concurrently with the State, insistence on exclusive federal jurisdiction serves no apparent congressional purpose.

Furthermore, where, as here, the alleged criminal conduct is conducted by non-Indians at the direction of Indian Tribes, to the prejudice of the public health, safety, and welfare of the citizens of the State,[7] and in *defiance* of congressional purpose, *see* 25 U.S.C. § 2710(d)(1)(B), (C), the Tribes exceed the scope of their sovereignty. *See, Montana v. United States*, 450 U.S. 544, 565-566 (1981);

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[7] The Court is requested to take judicial notice of the fact that when, as here, a class III gaming activity is impermissible on Indian lands and is, therefore, conducted in the absence of a tribal-state compact, the activity, including the books and financial records of the casino operation, is wholly without oversight by any federal or state agency; the National Indian Gaming Commission has jurisdiction to monitor only *class II* gaming. 25 U.S.C. § 2706(b)(1). F.R.Evid. 201. In this regard, the Court is also requested to take judicial notice of the fact that, in 1994, the United States filed a 23-count indictment against the operator of the Morongo Band's casino in California, under the Organized Crime Control Act (OCCA), 18 U.S.C. § 1955, charging, among other things, money laundering and use of a facility in interstate commerce in aid of racketeering (18 U.S.C. § 1952) – all arising out of the operation of slot machines in violation of Cal. Pen. Code § 330b. *United States v. E.C. Investments, Inc.*, No. CR-94-361-RG, app. pending, 9th Cir. No. 94-5063. The indictments connected with the Morongo Reservation casino were dismissed by the district court on the ground that, under the prohibitory/regulatory test adopted by this Court in *Cabazon*, Cal. Pen. Code § 330b is "regulatory" and, therefore, use of slot machines cannot be the basis for charging under the OCCA. *See, United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

South Dakota v. Bourland, ___ U.S. ___, 113 S.Ct. 2309, 2320 n.15 (1993) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' and is therefore, *not*, inherent.") In such a case, tribal assertion of 18 U.S.C. § 1166(d) as a bar to state criminal prosecutions becomes a sword to *defeat* the plan of IGRA, rather than a shield to preserve any legitimate aspects of tribal sovereignty.

Finally, to permit the Tribes to flout the congressional scheme by operating slot machines in violation of 25 U.S.C. § 2710(d)(1)(B) and (d)(1)(C), staying the hand of the State while awaiting discretionary action by the United States, is to ignore Congress' purpose in enacting Public Law 280 in the first instance. That purpose was to remedy the inability of the Federal Government adequately to protect both on-reservation and off-reservation residents from lawlessness in Indian country. *See*, Carol E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 540-541 (1975). It is not likely that the Federal Government is in a much better position today than it was in 1953 to enforce state gambling laws on California's 100 or so Indian Reservations, *see* 53 Fed.Reg. (No. 250) 52829 (December 29, 1988). Indeed, the acknowledged inability of federal agencies to oversee casino gambling on Indian lands, generally, was one of the considerations behind incorporation of *state* regulation of casino gambling through the mechanism of a tribal-state compact. *See*, S. Rep. 446, 100th Cong., 2d sess., p. 5 (1988).

The Court of Appeals should have considered all of these issues in deciding whether state enforcement of Cal.

Pen. Code § 330.1, under inherent police powers or pursuant to Public Law 280, is irreconcilably inconsistent with 18 U.S.C. § 1166(d). This Court should grant the Writ to do so.

B. The Writ Should Issue To Determine Whether IGRA Divested California Of Its Inherent Jurisdiction Over Non-Indians Committing "Victimless" Crimes On Reservations.

Even if California were without power to enforce Cal. Pen. Code § 330.1 against tribal officials, the state court defendants here were non-Indians. (*See* note 5, *supra*.) In the Court of Appeals, the District Attorney argued that California has inherent, sovereign jurisdiction over non-Indians violating state laws on Indian lands, except where the offense is committed against the person or property of an Indian. *See McBratney v. United States*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946); *United States v. Wheeler*, 435 U.S. 313, 324 n. 21 (1978); *see also, Duro v. Reina*, 495 U.S. 676, 679 n. 1 (1990).[8] This rule has been applied to find state jurisdiction over "victimless" crimes committed by non-Indians

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[8] Although the non-Indian status of the criminal defendants was never disputed by the Tribes (*see* note 5, *supra*), the significance of that status for purposes of analyzing California's criminal jurisdiction was raised for the first time in the Court of Appeals, in response to claims by the Tribes of a sovereign right to sue on behalf of their agents. The Court of Appeals denied the Tribes' motions to strike the argument concerning state jurisdiction over non-Indians, and the matter was fully briefed and argued in the appellate court.

within Indian country. *See e.g., State v. Snyder*, 807 P.2d 55 (Idaho 1991) and authorities cited therein; *see also*, Wm. C. Canby, Jr., *American Indian Law (2d ed.)* 140 (West 1988) [States have exclusive jurisdiction over "victimless crimes" committed by non-Indians in Indian country].

Inasmuch as Public Law 280, by its very terms, concerns only state jurisdiction over offenses committed *by or against Indians*, that statute is irrelevant to a determination of California's jurisdiction over the non-Indian state defendants.[9] The Court of Appeals made no effort to analyze the extent of California's jurisdiction, following enactment of IGRA, over the non-Indian defendants. To the extent that the Court of Appeals may have assumed that 18 U.S.C. § 1166(d) swallowed up California's jurisdiction over non-Indians as well as over Indians, the court gave no attention to the factors discussed in paragraph A above that argue in favor of California's *concurrent* right to regulate the operation of slot machines on Indian lands, i.e., factors that would harmonize state criminal jurisdiction over non-Indians with 18 U.S.C. § 1166(d).

Moreover, congressional efforts to divest States of their jurisdiction over Indian country gambling crimes

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[9] Even assuming, *arguendo*, that a Tribe, in some circumstances, might cloak its non-Indian agents with immunity against state criminal prosecution, a proposition for which there is no known authority, the Tribes certainly could not do so here. In this case, both the Tribes and their agents were acting in violation of federal law by operating on Indian lands gambling devices that are prohibited by state law, *see* 25 U.S.C. § 2710(d)(1)(B), and, in any event, without a tribal-state compact, *see* 25 U.S.C. § 2710(d)(1)(C).

committed by non-Indians present an obvious conflict between Congress' power respecting Indian matters and the States' sovereign power to regulate, in the public interest, the conduct of persons within state boundaries. *Cf., James v. Duro Contracting Co.*, 302 U.S. 134 (1975) [Allocation of legislative jurisdiction over territory within the political domain of one of the sovereign states is a matter of agreement between two sovereigns].[10] In light of these tensions, this Court should issue the Writ to consider whether a balancing test should be applied here for the purpose of determining whether, under the facts presented in this case, California's interest in enforcing its slot machine prohibitions uniformly within the State outweighs the federal and tribal interests reflected in 18 U.S.C. § 1166(d). *Cf., Cabazon, supra*, 480 U.S. at 214-222. Cross-Petitioner submits that where, as here, the activity is being undertaken in defiance of federal law, the tribal interests are non-existent, and California's interest in enforcing its slot machine prohibitions should prevail. Indeed, in this regard, California interest is entirely consistent with Congress' purposes.[11]

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[10] The Court may take judicial notice of the fact that the Indian Reservations involved in this litigation were all created by executive order after California's entry into the Union. No part of this territory was reserved in the Act of Admission. *United States v. Bateman*, 34 F. 86, 88, 89 (Cir. Ct. N.D.Cal. 1888).

[11] If the Tribes had harbored any genuine doubts about whether these machines constituted class III gaming, the Tribes could have brought an action against the San Diego County Sheriff for a declaration as to their status. 28 U.S.C. §§ 2201, 2202; *cf., Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (1982); *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (1982), *aff'd., Cabazon, supra*, 480

C. The Writ Should Issue To Clarify The Limits Of The Prohibitory/Regulatory Test Adopted By The Court In *Cabazon*.

As noted above, the District Attorney contends that, under the facts of this case, California's jurisdiction under Public Law 280 can and should be harmonized with federal jurisdiction pursuant to 18 U.S.C. § 1166(d). But, moreover, he urges that the Writ issue to settle the point that Cal. Pen. Code § 330.1 is "criminal/prohibitory" within the meaning of *Cabazon* and that, therefore, California has jurisdiction, under Public Law 280, to enforce Cal. Pen. Code § 330.1 where, as here, the unlawful conduct is being sponsored by an Indian Tribe in violation of IGRA. *Cf. People v. Snyder*, 532 NYS2d 827 (1988) [New York slot machine prohibition enforceable on Indian lands].

In *Cabazon*, the Court considered the question whether California has jurisdiction to enforce Cal. Pen. Code § 326.5 against Indian Tribes pursuant to "Public Law 280," 18 U.S.C. § 1162(a).[12] Adopting a "prohibitory/regulatory" standard, *see Bryan v. Itasca County*, 426 U.S. 373 (1976); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (8th Cir. 1981), cert. denied, 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy, supra*, 694 F.2d 1185 (9th Cir. 1982), cert. denied,

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U.S. 202. Instead, seeking shelter behind 18 U.S.C. § 1166(d) and this Court's decision in *Cabazon*, the Tribes elected to install the devices and simply force the issue with county law enforcement officials.

[12] Section 326.5 specifies the terms and conditions under which bingo may lawfully be played in California.

461 U.S. 929 (1983), the Court held that "Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations." *Cabazon*, 480 U.S. at 212.

The Court stated that the "shorthand test [for the prohibitory/regulatory distinction] is whether the conduct at issue violates the State's public policy." 480 U.S. at 202. However, the Court went on to describe those limited forms of gambling that are permitted in California, and concluded that "California regulates rather than prohibits *gambling in general* and bingo in particular." *Id.* at 211 (emphasis added). The Court's formulation has led other courts to conclude that even violation of a categorical prohibition may nevertheless constitute something *other* than a violation of public policy. *Cf., Cabazon, supra*, 480 U.S. at 211 n. 10. Thus, the district court below made the anomalous statement that California's "slot machine *prohibition* is a *civil/regulatory* law." Pet. Appx. B-7 (emphasis added).[13] Furthermore, those courts that have relied on the *Cabazon* test for the purpose of determining whether a gaming activity is "permitted" in a State within the meaning of IGRA, *see* 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B), have similarly found that a State's

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[13] The Barona and Viejas Tribes characterized California's slot machine prohibitions as "a prohibitory island in a regulatory sea," Br. of Appellees Barona Band and Viejas Band, p. 14. While grandiloquent, the description can obviously render the rule meaningless – depending on how vastly one's "sea" is defined. The District Attorney believes that California's relevant "regulatory sea," for example, should be described as *non-casino* style gambling, e.g., lotteries, parimutuel wagering on horse racing, and charity bingo. In contrast, the Tribes define the relevant "sea" as gambling in any form.

"regulatory sea" of "gambling," eclipses state "prohibitory islands" against slot machines or other forms of casino gambling. *See, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480, app. dismissed, 957 F.2d 515 (7th Cir. 1992), cert. denied, 113 S.Ct. (1992); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 363-367 (8th Cir. 1990); *Ysleta del Sur Pueblo v. Texas*, 852 F.Supp. 587 (W.D. Tex. 1993), rev'd on other grounds, *Ysleta del Sur Pueblo v. Texas, supra*, 36 F.3d 1325, cert. denied. 115 S.Ct. 1358 (1994).

Certainly, it would not be an exaggeration to state that the "prohibitory/regulatory" dichotomy approved by this Court in *Cabazon*, and the application of that dichotomy in the case of California, is responsible for virtually all of the litigation between Indian Tribes and States under IGRA.[14] Armed with an expansive characterization of the *Cabazon* test and the sweeping application thereof by some courts, Tribes sue States for bad faith refusal to negotiate when States protest that the gaming activity demanded by the Tribe is prohibited within the State. *See* 25 U.S.C. § 2710(d)(7)(A)(i)

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[14] Indeed, the Court's *Cabazon* analysis can be said to be responsible for virtually all recent litigation, generally, between States and Tribes, as Tribes and their members seek to limit state criminal jurisdiction in Indian country. *See e.g., Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 148-149 (9th Cir. 1991), cert. denied, 112 S.Ct. 1704 (1992) [Washington may not enforce speed limits in Indian country]; *St. Germaine v. Circuit Court*, 938 F.2d 75, 77 (7th Cir. 1991), cert. denied, 112 S.Ct. 1704 (1992) [Wisconsin may enforce its driving license requirement in Indian Country]; *Quechan v. Mullen*, 984 F.2d 304 (9th Cir. 1993) (state law prohibiting only specified fireworks is "prohibitory"); *see also, Serian v. State*, 588 So.2d 251 (Fla. App. 1991) [unlike state licensing of hunting and fishing, state licensing of optometrists is "criminal/prohibitory"].

[conferring jurisdiction over suits "bad faith" suits by Tribes against States]. Indeed, in one of the earliest decisions under IGRA, a Court of Appeals found Connecticut to have exhibited bad faith *per se* by refusing to negotiate with a Tribe on the ground that the gaming activities demanded by the Tribe are prohibited by state law. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032-1033 (2d Cir. 1990), cert. denied 499 U.S. 975 (1991).

In California, sixteen Indian Tribes demanded that the State negotiate about casino-style games that are categorically prohibited by State law, relying on *Lac du Flambeau, supra*, 770 F.Supp. 480, and that court's application of the *Cabazon* test. In order to avoid the mandatory-compact consequences that befell Connecticut in *Mashantucket Pequot, supra*, California suggested that the dispute be submitted to the federal courts for disposition in an action for declaratory relief. The action was filed in 1992, and there has yet to be a final disposition of the dispute. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 422, 426 (9th Cir. 1994), pet. rhrg. pending.[15]

As a result of the ambiguity created by the *Cabazon* test, and the unwillingness of California Tribes to await

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[15] Indeed, the Court may take judicial notice of the fact that, despite the Ninth Circuit's ruling in *Rumsey*, other California Tribes persist in litigating against California for refusal to conduct face-to-face negotiations about casino games that are categorically prohibited by Cal. Pen. Code §§ 330, 330b, and 330.1. *See* Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 16, line 25, *Soboba Band of Mission Indians v. Wilson*, E.D.Cal. No. S-94-1770 ["frivolous" for State to refuse to meet with Tribe for purposes of discussing compact covering games prohibited by Cal. Pen. Code § 330].

the outcome of *Rumsey Indian Rancheria*, there are now over 7,500 slot machines operating illegally on Indian lands in California.[16] As early as the Fall of 1991, the three Indian Tribes in this proceeding installed and operated gambling devices of the sort in dispute in the *Rumsey Indian Rancheria* litigation.[17]

The United States has been unwilling to take action against the Tribes in this case for operating slot machines in violation of IGRA.[18] Moreover, in the Central District

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[16] The Court is requested to take judicial notice of this fact, which can readily be verified by investigative records of the California Department of Justice, the Federal Bureau of Investigation, and the National Indian Gaming Commission. F.R.Evid. 201.

[17] The Court may take judicial notice that, in March 1995, Riverside County Sheriff's deputies seized some 29 slot machines on an interstate freeway in California, destined for the casino operated by the Twenty-Nine Palms Band of Mission Indians. The County has now been sued for recovery of the devices by a corporation chartered by the Coeur d'Alene Tribe of Idaho. Among other things, the plaintiff contends that California has no jurisdiction over Indian gaming matters or over gaming equipment owned by an Indian Tribe. *Stick Games, Inc. v. Riverside County, California*, C.D.Cal. No. 95-2629.

[18] The Court is requested to take judicial notice of the fact that the United States Attorney for the Southern District of California has expressly and publicly stated that he will not take action against the Sycuan, Viejas, or Barona Bands until there is a resolution of the dispute in *Rumsey Indian Rancheria*. Shortly after the district court's decision below, the Sycuan, Barona, and Viejas Tribes collectively installed more than 2,500 new slot machines. The U.S. Attorney's agreement with the three San Diego County Tribes included a condition that no other Tribe in the Southern District would be permitted to open a class III casino. *See* "U.S. Attorney and tribes OK gaming truce," *The San*

of California, enforcement of the Organized Crime Control Act against slot machine operation on Indian lands has been barred by the federal court, based on this Court's *Cabazon* test. *See* note 7, *supra*. As a consequence, Indian Tribes in California have been able to run roughshod over the IGRA and state gambling laws, and California must pay the price in casino-related crime. *Cf., Cabazon, supra,* at 220-221 [state's concern about organized crime insufficient to overcome preemption], *but see, Cabazon* at 226-227 (Stevens, J., dissenting).[19]

Diego Union-Tribune, p. A-1 (July 1, 1994). Not surprisingly, when the United States recently sought injunctive relief against another San Diego Tribe attempting to open a new casino, the United States was met with a defense of unfair treatment. *United States v. Rincon Band of Mission Indians*, S.D.Cal. No. 95-0557.

[19] For example, in 1992, Criminal Case No. 92-26, the United States established before the District Court for the Southern District of California that "the mafia had infiltrated the gaming establishment on the Rincon Band Reservation." *See*, Order re Contempt, ¶ 7, *United States v. Rincon Band of Mission Indians*, S.D.Cal. No. 95-557 (May 5, 1995). At that time, the Rincon Band was operating only a high-stakes bingo establishment. In addition, Cross-Petitioner has already adverted the Court to the 23-count indictment related to the use of slot machines on the Morongo Reservation, also in southern California. *See* note 7. The Court is also requested to take judicial notice of the fact that between March and June 1995, violent disputes erupted in three northern California Indian casinos, at least one involving gunfire. *See* "Attorney General seeks gambling crackdown," *Orange County Register* (June 15, 1995). One of the casinos was shut down by one tribal faction disputing with another over distribution of casino earnings and the lack of any accountability for revenue. As one tribal faction reported, "The casino has earned about $6 million since it opened but there's no accountability. We don't know where the money has gone." "Tribe feud shuts Clear Lake casino," *Santa Rosa Press Democrat* (June 10, 1995).

The Court should issue the Writ to clarify the confusion relative to the limits of the *Cabazon* prohibitory/regulatory test. In deciding whether the Tribes here had exclusive jurisdiction to regulate slot machines on their Indian lands, *see discussion*, pages 7-8, *supra*, the Court should clarify that California's "criminal law and public policy" is reflected in the statute itself. That is to say, the Court should make clear that Cal. Pen. Code § 330.1 is itself an expression of California's public policy, and courts are not expected to "second guess" the California Legislature to determine whether, though slot machines are clearly *prohibited* by statute, the state "policy" toward slot machines may be something *other* than prohibitory of slot machines.[20]

Even more importantly, the Writ should issue in order to bring an end to the state of lawlessness that exists on Indian lands in California, and the potential for even greater expansion thereof, that has resulted from confusion concerning the meaning of this Court's *Cabazon*

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[20] Such "second guessing" is reflected, for example, in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, E.D.Cal. No. 92-812, Amended Order on Cross-Motions for Summary Judgment, pp. 14-15 (July 20, 1993) ["The combined effect of IGRA and *Cabazon* is that a two step analysis must be used . . . . First, the court must ascertain whether the state permits each proposed game to be played . . . . [¶] In the case where a proposed game has *not* been permitted by the state, the court must proceed to the second step of its analysis. In such instance, Congress has directed the courts to employ the *Cabazon* analysis to determine whether the proposed game violates the state's public policy." (emphasis added)], rev'd, *Rumsey Indian Rancheria v. Wilson*, *supra*, 41 F.3d 422 (9th Cir. 1994).

test.[21] The Court is urgently requested to issue the Writ and revisit its articulation of that test.

D. The Writ Should Issue To determine Whether The Tribes' Petition Presented A Case Or Controversy Within The Meaning Of Article III Of The Constitution.

Cross-petitioner contends that the Tribe had no standing to sue for the purpose of asserting federal claims belonging to the state defendants. The Court of Appeals, however, found that the Tribe had standing by analogizing the condition of the Tribes here to that of the Tribe in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). The two situations are manifestly distinguishable.

In *Mescalero Apache Tribe*, the Tribe was seeking to protect its jurisdiction over hunting and fishing by non-Indians. Unlike hunting and fishing, however, the Tribes here have no jurisdiction to regulate slot machine gambling on their reservations. 25 U.S.C. §§ 2701(5), 2710(d)(1)(C). Since slot machine gambling is prohibited as a matter of state law, Cal. Pen. Code §§ 330a, 330b, 330.1, it is unlawful on Indian lands as well. 25 U.S.C. § 2710(d)(1)(B). Furthermore, even in those cases where slot machine gambling is permissible on Indian lands because is it permitted in the State, *see* 25 U.S.C. § 2710(d)(1)(C), a Tribe *acquires* jurisdiction to regulate

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[21] The Court is requested to take judicial notice of the fact that, in addition to the existing 25 or so class III casino operations already in existence, another 25 casinos are planned for the relatively near future. *See*, California Department of Justice, *Intelligence Operations Bulletin*, vol. 60 (June 1995).

the activity only pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C); *see*, 25 U.S.C. §§ 2710(d)(3)(C)(ii) [tribal-state compact to address allocation of regulatory jurisdiction between Tribe and State], 2710(d)(6) [slot machine prohibitions of 15 U.S.C. § 1175 apply unless slot machines are lawful in the State and the gambling is conducted pursuant to an approved tribal-state compact].

Here, no tribal-state compact exists; therefore, the Tribes have no regulatory jurisdiction over slot machine gambling on their lands. Unlike *Mescalero Apache Tribe*, then, the Tribes' suit cannot be said to have been brought in furtherance of any tribal regulatory jurisdiction over the disputed conduct.

Indeed, because slot machine gambling is prohibited on Indian lands by federal law, 15 U.S.C. § 1175; 25 U.S.C. § 2710(d)(6); *see also*, 25 U.S.C. § 2710(d)(1)(B), and because Indian Tribes in California have no jurisdiction to regulate slot machine gambling on their lands, the Tribes here suffer no judicially cognizable injury as a result of state prosecution of their agents for slot machine gambling. The district court therefore lacked jurisdiction over the Tribes' complaint. U.S. Const., Art. III., § 2, cl. 1.[22]

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[22] The Tribes cannot ground Article III jurisdiction on a theory that prosecution of their casino managers jeopardizes gambling revenues. As a matter of federal law, without a tribal-state compact, the Tribes may not lawfully generate or earn revenues from slot machine gambling. 15 U.S.C. § 1175; 25 U.S.C. § 2710(d)(1)(B), (C). Accordingly, the Tribes can have no judicially cognizable economic interest in preventing the prosecution of their casino managers for violation of Cal. Pen. Code § 330.1.

E. The Court Should Issue The Writ And Reverse Because The District Court Was Clearly Barred By 28 U.S.C. § 2283 From Enjoining The State Criminal Prosecutions.

The Court of Appeals ruled that the bar of 28 U.S.C. § 2283 did not apply here because the injunction "was necessary to preserve federal jurisdiction over Indian gaming [under 18 U.S.C. § 1166(d)] and it was 'authorized by Congress.' " Pet. Appx. A-12. The ruling is patently erroneous.

The bar against injunction of state court proceedings is not excused when the injunction is employed to preserve federal jurisdiction, generally, but rather, when it is employed "in aid of *the court's* jurisdiction." 28 U.S.C. § 2283 (emphasis added). The district court relied on *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301 (9th Cir. 1988) as support for the injunction, but the Court of Appeals agreed that *Smith Plumbing* is inapposite. Pet.Appx. A-12 n. 4.

The Court of Appeals also ruled, without relevant supporting authority, that the injunction is authorized by IGRA.[23] That Act does confer equitable jurisdiction upon federal courts to redress claims by Tribes that States have

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[23] The Court of Appeals cited *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) as an example of an injunction against state court proceedings, "because federal law preempts state jurisdiction over unfair labor practices." However, as is clear from this Court's decision in *Capital Service, Inc.*, the injunction was deemed permissible only "in aid of the court's jurisdiction" in a proceeding then before the district court under the National Labor Relations Act.

failed to negotiate in good faith and to enjoin unlawful class III gaming in violation of a compact. 25 U.S.C. §§ 2710(d)(7)(A)(i), (ii). No other federal right enforceable in equity is created by IGRA, and there is no support for the proposition that Congress intended to give *Tribes*, as contrasted, perhaps, with state criminal defendants, a right to enforce in equity the provisions of 18 U.S.C. § 1166(d). Moreover, the relevant congressional purpose behind IGRA – viz., the conduct of only *permissible* class III gaming on Indian lands and, then, only pursuant to regulation under a tribal-state compact – can be satisfactorily accomplished by permitting the state criminal prosecutions to proceed unabated. *Cf., Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) [Clayton Act does not authorize injunction against state proceedings].

F. The Court Should Issue The Writ And Reverse Because The District Court Exceeded Its Jurisdiction By Failing To Dismiss The Action Pursuant To *Younger v. Harris*.

In rejecting the District Attorney's protest that dismissal of the action was required pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), the Court of Appeals stated: "While the State may well have an interest in seeing that the federal government enforces the State's laws in Indian country, it can have no legitimate interest in intruding on the federal government's exclusive jurisdiction to prosecute." Pet. Appx. A-14. However, as noted earlier, state court prosecution for slot machine gambling on Indian lands is not at all intrusive of federal interests.

Congress limited state criminal prosecution of gambling offenses only out of deference for traditional concerns of tribal sovereignty. *See*, S. Rep. 446, 100th Cong., 2d sess., 5-6 (1988). But the notion of tribal sovereignty does not encompass a prerogative to contravene federal law. Stated otherwise, Tribes have no sovereign interests – inherent or otherwise – in preventing state court prosecutions for slot machine gambling by non-Indians in contravention of IGRA, even when the unlawful conduct is sponsored by the Tribe itself.[24]

Exclusive federal prosecution under 18 U.S.C. § 1166(d) is not an end in itself, but is rather intended to serve a congressional interest of acknowledging tribal sovereignty. That federal interest is not undermined, however, when there is no legitimate tribal sovereignty interest that is served by excluding state prosecution. The district court should have dismissed the Tribes' action in deference to the state court proceedings pursuant to *Younger v. Harris. Cf., Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709 (10th Cir. 1989) [*Younger* does not apply where state action is brought to enjoin tribal gaming activity that promotes congressional purpose].

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[24] Once the district court rejected the Sycuan Band's claim that the Autotab Model 101 is a class II gaming device, Pet. Appx. E, the court had no alternative but to conclude that the machines were being operated in violation of IGRA. 25 U.S.C. § 2710(d)(1)(C). As a matter of law, then, the Band could have no interest in preventing state prosecution of non-Indians managing the machine operations.

CONCLUSION

There is a long history in California of prohibiting and vigorously prosecuting slot machine gambling. The California Constitution prohibits the Legislature from authorizing casinos "of the type currently operating in Nevada and New Jersey."[25] California law even prohibits the State Lottery from employing the theme of slot machines in its lottery tickets. Cal. Gov. Code § 8880.28.

Nevertheless, and despite no change in California law, there are now some 7,500 slot machines operating illegally in some 25 Indian casinos located throughout the State. California law enforcement officials have been barred by the courts below from stopping the expansion of casino gambling in California, and the Federal Government seems to be paralyzed to do anything about it. Indeed, one district court has also barred even the *Federal Government* from taking any action against the slot machines under the Organized Crime Control Act. All the while, there seems to be no reasonable doubt that slot machines are unlawful – as a matter of federal law – on Indian lands in California, at least without a tribal-state compact.

There is a state of lawlessness on Indian lands in California that has its roots in this Court's decision in

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[25] This provision was enacted in 1984, three years prior to this Court's decision in *Cabazon*. There is, perhaps, no small irony in the fact that, as a result of the confusion surrounding the prohibitory/regulatory test adopted by this Court in *Cabazon* and the confusion surrounding the relationship of that test to IGRA, Nevada and New Jersey are no longer the only States hosting casinos.

Cabazon. The Court is urgently requested to issue the Writ and eliminate this impediment to state law enforcement.

Respectfully submitted,

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APPENDIX

No. 94-2064

In The

Supreme Court of the United States

October Term, 1995

PAUL PFINGST, District Attorney of
San Diego County, California,

Cross-Petitioner,

v.

SYCUAN BAND OF MISSION INDIANS, *et al.*,

Cross-Respondents,

**Cross-Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

CROSS-PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYCUAN BAND OF MISSION INDIANS, Plaintiff-Appellee/ Cross Appellant, v. JIM ROACHE, Individually and as Sheriff of San Diego County, Defendant, and EDWIN L. MILLER, JR., Individually and as District Attorney of San Diego County Defendant-Appellant/ Cross-Appellee.	No. 93-55430/ 93-55431 DECLARATION OF WILLIAM J. COLLINS

I, WILLIAM J. COLLINS, hereby declare that I was the Deputy District Attorney assigned to prosecute the cases of People of the State of California versus James Thomas Trant and People of the State of California versus Emmett Munley, Helen M. Chase and Roy C. Palmer.

These cases resulted from the service of search warrants on the Sycuan and Barona Indian reservation casinos on October 30, 1991, during which slot machines were recovered. Upon reviewing the official reports of the San Diego County Sheriff's Department regarding those searches, it was my understanding that Mr. Trant was the business manager of the Sycuan tribe, and thus responsible for the day-to-day operations of the casino. It was also my understanding that Mr. Munley was the casino manager for the Barona casino, Mrs. Chase the assistant manager and Mr. Palmer, a resident of Illinois who owned Interstate Gaming Services, Inc., the suppliers of the slot machines found at Barona. I issued San Diego Municipal Court Case No. M635264 against Mr. Trant and No. M635263 against Mr. Munley, Mrs, Chase and Mr. Palmer. None of the people named in the complaints were tribal members, but were non-Indian professionals who ran the casinos or supplied gambling machines to the casinos.

I did not issue charges against any tribal members because it is my experience that, in San Diego County, casinos on Indian reservations are not run by the tribal chairmen or other tribal members, the practice being that the tribes hire outside professionals to conduct casino operations. I felt that the gaming professionals who operated and supplied the casino were responsible for any illegal activities in the casinos. I further felt that the non-

professional tribal members were not likely to be familiar with the rather complex laws affecting casino operations and would take the advice of those hired to run them.

A similar search warrant had been served at the Viejas reservation and similar slot machines recovered. At Viejas, however, the sheriff's deputies had not been able to determine the identity of the casino manager. The sheriff's deputies involved in that service named Anthony Russell Pico as the suspect, simply because he was the tribal chairman.

It is the custom of the San Diego County District Attorney's Office to send letters to charged defendants, upon the filing of misdemeanor charges, notifying them of the charges filed and the date and time arraignment has been set. These letters are prepared by our issuing clerks before any complaint is physically taken to court for filing. They are then sent out in the normal course of business. No warrants are issued in these cases unless the defendant does not appear for arraignment. In the instant cases, no defendants were arrested and notification letters were sent to all charged defendants.

I am informed that Mr. Pico also received such a letter bearing Municipal Court Case No. M635265. I have attached a copy of that letter as Exhibit "A". This was the result of an error on my part in preparing issuing documents in his name due to his being identified as the suspect by sheriff's deputies. When I realized that Mr. Pico was the tribal chairman, and was not involved in casino operations, I withdrew the issuing documents before charges were filed against him. Since no case was filed using number M635265, that number was later used

in the filing of a hazardous waste complaint against one Walter Michael Breining, a person unrelated to the instant litigation. I have attached a copy of the complaint in Mr. Breining's case as Exhibit "B".

As a result, a review of cases filed in the San Diego Municipal Court will reveal that no case has ever been filed against Mr. Pico for Possession of Slot Machines, and the only cases bearing his name are his convictions for Assault With a Deadly Weapon and Driving Under the Influence of Alcohol.

I swear the above is true and correct under the penalty of perjury.

Executed this sixteenth day of May, 1994, at San Diego, California.

/s/ William J. Collins
WILLIAM J. COLLINS
Deputy District Attorney

95-174

No. 94-2064

Supreme Court, U.S.
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SEP 19 1995
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In The

Supreme Court of the United States

October Term, 1994

PAUL PFINGST, District Attorney of San Diego County, California,

Cross-Petitioner,

vs.

SYCUAN BAND OF MISSION INDIANS, *et al.*,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR CROSS-RESPONDENT SYCUAN BAND OF MISSION INDIANS

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CONCISE SUMMARY OF CASE

For the reasons set forth below in Petitioner's Rule 15.1 Statement, Cross-Petitioner's "Summary of Facts" is an unreliable basis for this Court's consideration of the Cross-Petition. For an accurate recitation of the material facts in this case, Petitioner Sycuan Band of Mission Indians ("Sycuan") refers the Court to the Factual Background set forth in its pending Petition for Writ of Certiorari ("Sycuan Pet.") at 11-17, and the District Court's factual findings, set forth in Sycuan Pet. at App. B, App. E, and App. I. Petitioner further corrects and rectifies omissions in the Cross-Petitioner's factual statements as follows.

It is undisputed, and the District Court found, that Sycuan established its gaming operation on the Sycuan Indian Reservation in 1983 in order alleviate the severe economic depression, unemployment, substandard housing and sanitation conditions, and other deprivations of basic services that had long afflicted the Reservation community. Sycuan Pet. at App. B-2, App. K-3 to K-4. It is also undisputed that Sycuan, as the owner and operator of its facility, uses its gaming revenues to provide employment to Tribal members, and to fund a broad variety of essential governmental and social services and programs, including public safety and fire protection, medical, dental and ambulance service, educational scholarships, cultural, senior and nutritional programs, water and sanitation facilities and services, and housing development and rehabilitation. Sycuan Pet. at App. B-2 to B-3, App. K-4 to K-6.

The Cross-Petition challenges the Court of Appeals' affirmance of the District Court's exercise of jurisdiction to enjoin: (1) the State's criminal prosecution in State court of individuals whom the local sheriff and District Attorney alleged were offering unlawful electronic games at Sycuan's gaming facility; and (2) further seizures by the sheriff of such gaming equipment, records and cash.

The local sheriff and District Attorney had unilaterally determined that the electronic pulltab dispensers used by Sycuan constituted Class III devices, rather than permissible "technologic aids" to the Class II game of pulltab expressly permitted by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The sheriff and District Attorney also unilaterally determined, based on a memorandum from California's Attorney General, that the dispensers qualified as "slot machines" under California law, that California law prohibited their use on Indian Reservations, and that the State had jurisdiction to enter the Reservation, seize the dispensers and other items, and criminally prosecute Tribal employees. *See* Sycuan Pet. at App. B-11.

After declining Sycuan's invitation to discuss the matter on a government-to-government basis, *see* Sycuan Pet. at App. K-9, the sheriff obtained search warrants from the municipal court, and dozens of sheriff's deputies raided the Sycuan gaming facility and seized the electronic pulltab dispensers, cash, and records. Thereafter, Cross-Petitioner commenced prosecution of Sycuan's business manager for violations of State gambling laws.

Sycuan sued to enjoin future raids of its business by the sheriff, as well as the prosecution of its business manager, on the grounds, *inter alia,* that IGRA unambiguously provides: "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws." 18 U.S.C. § 1166(d). Sycuan further relied on this Court's ruling in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), that California regulates, rather than criminally prohibits, gambling, thereby divesting California of any criminal jurisdiction over gambling offenses in Indian country that California otherwise might have had under Public Law 83-280, codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 ("P.L. 280"). In addition, prior to and throughout this litigation, Sycuan steadfastly has maintained that the seized pulltab dispensers are

neither "slot machines" nor Class III devices, but rather are "technologic aids" to the Class II game of pull-tab, and as such are expressly permitted by IGRA in the absence of a Tribal-State compact. 25 U.S.C. § 2703(7)(A)(i).[1] This latter question is the subject of Sycuan's pending Petition for Writ of Certiorari in this case.[2]

Both the District Court and the Court of Appeals agreed with Sycuan that regardless of whether the seized dispensers constituted Class II or Class III gaming devices for purposes of IGRA, the State had no jurisdiction to make its own determination and undertake unilateral enforcement action and prosecution against such electronic gaming on Indian lands. This result is supported by the plain, unambiguous language of the pertinent jurisdictional statutes, by this Court's ruling in *California v. Cabazon*, and by every other federal court that has addressed the issue. It is this result that Cross-Petitioner would have this Court review.

Cross-Petitioner's argument necessarily would empower any State or local law enforcement agency or individual officer to make the determination — at its sole discretion — to stop a Tribe from engaging even in Class II gaming by summarily seizing equipment, cash and records, arresting and initiating

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1. The Court of Appeals conceded that this is a close question. Sycuan Pet. at App. A-18. The District Court held that the seized dispenser "is itself the game of pulltab." *Id.* at App. E-10. The game of pulltab is expressly authorized by California Penal Code § 328.5(o). The New Mexico Court of Appeal agreed with Sycuan's position that the electronic version of pulltab is nevertheless the Class II game of pulltab. *Infinity Group, Inc. v. Manzagol*, 884 P.2d 523, 526, 118 N.M. 632, *cert. denied*, 882 P.2d 1046, 118 N.M. 533 (1994).

2. Sycuan was not a party to, and the Autotab 101 pulltab dispensers seized at Sycuan were not at issue in, *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. denied*, 114 S. Ct. 2709 (1994).

prosecutions of Tribal officials and employees and, in effect, completely disrupting or even forcing the closure of a Tribal gaming facility. During the pendency of the inevitable judicial proceedings following such action, the Tribal government would be deprived of the revenues that Congress intended it should have to support its governmental functions and programs, Tribal members would be denied the employment opportunities that Congress intended be conferred through Tribal gaming, and the entire Reservation community would be deprived of the economic benefits that Congress intended should be available to Reservation communities through Tribal governmental gaming.[3] Such an outcome would, in short, render both IGRA and this Court's decision in *California v. Cabazon* dead letters.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Cross-Petition does not present any "special or important reasons" for review, as required by Supreme Court Rule 10.1. There is no conflict among the Courts of Appeals, or between the State and federal courts, on the jurisdictional issues presented. The jurisdictional statutes at issue are unambiguous and do not require this Court's interpretation. Finally, the decision below is entirely consistent with this Court's prior decisions. The sole purpose of the Cross-Petition is to persuade this Court to eliminate the jurisdictional foundations of IGRA, to effectively repudiate its ruling in *California v. Cabazon*, and to deliver to the State what the State did not even have before IGRA and *California v. Cabazon:* Unfettered State jurisdiction over *all* forms of Indian gaming in Indian country. Such a result not only is legally insupportable, but would eviscerate IGRA and economically devastate Tribes across the nation.

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3. The District Court based its injunction, in part, on Sycuan's uncontroverted showing that it was irreparably harmed by the seizure of the pulltab dispensers, which deprived the Tribe of "income necessary to provide basic governmental services and to provide employment to its members." Sycuan Pet. at App. I-20.

RULE 15.1 STATEMENT

Pursuant to Supreme Court Rule 15.1, Sycuan hereby addresses the pertinent misstatements of fact and law made by counsel for Cross-Petitioner. These numerous and material misstatements render Cross-Petitioner's "Questions Presented", "Summary of Facts", and "Reasons for Granting the Writ", an unreliable basis for this Court's consideration of the Cross-Petition. Moreover, in a transparent effort to bias the Court against Indian gaming, Cross-Petitioner repeatedly asks the Court to take judicial notice of sensational "facts" that are not facts at all, much less relevant to the jurisdictional issues presented.

1. Cross-Petitioner incorrectly states that Sycuan installed "slot machines prohibited under the California Penal Code", and that "[i]t was never seriously disputed by the Tribes that, if permitted to do so, the District Attorney could prove that the confiscated devices did, in fact, constitute 'slot machines' within the meaning of Cal. Pen. Code § 330.1." Cross Petition at 5 and footnote 3. Rather, the record reflects[4] that Sycuan consistently has contended — from its pleadings to its pending Petition — that the gaming equipment that County officials seized are *not* "slot machines" and that the legal status of that equipment is to be determined by federal law,[5] not California law as Cross Petitioner has urged throughout these proceedings.

2. Throughout his "Summary of Facts" and "Reasons for Granting the Writ", Cross Petitioner relies on the flawed syllogism that because the seized equipment constituted "slot

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4. *See, e.g.*, Sycuan Pet. at App. L-2 to L-8.

5. Including IGRA and this Court's criminal/prohibitory-civil/regulatory test set forth in *California v. Cabazon Band*, 480 U.S. 202 (1987).

machines", and because slot machines are criminally prohibited by California, therefore California and its agents had jurisdiction to seize the equipment. However, there is no finding in the record that the seized equipment constituted slot machines.[6] Moreover, contrary to Cross-Petitioner's repeated contention (*e.g.* Cross-Petition at 8), under *California v. Cabazon* California does not "categorically prohibit" slot machines; indeed, California does not "prohibit" slot machines at all. Although California Penal Code sections 330a, 330b and 330.1 purport to proscribe the possession and operation of slot machines for gambling purposes, the California Court of Appeal recently determined that subsequent legislation authorizes the California State Lottery to utilize what California law defines as slot machines in the operation of the Lottery's games. *Western Telcon, Inc. v. Calif. State Lottery,* 43 Cal. Rptr. 2d 747 (1995), *petition for hearing pending.*[7] Moreover, section 326.5(o) of the California Penal Code expressly authorizes use of at least some forms of what Penal Code section 330c defines as slot machines. In *Rumsey Indian Rancheria v. Wilson,* 41 F.3d 421 (9th Cir. 1994), the Ninth Circuit remanded to the District Court the determination whether California allows the operation of slot machines, through the State Lottery or otherwise, but has stayed its mandate in order to review supplemental briefs on the significance of *Western Telcon. See* Order, Aug. 21, 1995 (9th Cir. 1995).

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6. Instead, the undisputed record shows that the seized pulltab dispensers lack most of the attributes commonly associated with "slot machines." Specifically, the dispensers are not actuated by handles, have no spinning reels, do not dispense coins or currency, and perhaps most significantly, offer a fundamentally different game than does a "slot machine." *See* Sycuan Pet. at 11-17 for a full description of the seized game.

7. *Western Telcon* held that the State Lottery's computerized, on-line keno game is lawful even if it is a slot machine, because the State Lottery is exempt from sections 330 *et seq.* of the Penal Code.

3. Cross-Petitioner incorrectly states that "[t]here is an unresolved question whether criminal proceedings were actually ever initiated against Viejas Tribal Chairman Anthony Pico, a member of the Viejas Tribe and the only Indian alleged to be among the criminal defendants." Cross-Petition at footnote 5. In fact, Cross-Petitioner's Answer in the District Court *admitted* that criminal proceedings had been initiated against Mr. Pico. The District Court adopted this binding admission, and Cross-Petitioner's belated and unsubstantiated attempt to revoke his earlier admission was rejected, as Cross-Petitioner himself points out, by the Court of Appeals. In any event, the status of those persons as Indians or non-Indians was irrelevant to the District Court's and the Court of Appeals' determination that the District Attorney had no jurisdiction to prosecute those persons for alleged violations of California's gaming laws on the respective Reservations.

4. At page 9, footnote 7, the Cross-Petitioner asks the Court to take judicial notice of the "fact" that Class III gaming in the absence of a Tribal-State compact "is wholly without oversight by any federal or State agency; the National Indian Gaming Commission has jurisdiction to monitor only *class II* gaming." To the contrary, IGRA gives the NIGC broad authority to enforce IGRA's terms, including the power to stop unlawful Class III gaming. 25 U.S.C. § 2713. NIGC has in fact issued and enforced cease and desist orders against Tribes and persons operating Class III games in the absence of a compact.[8]

5. In his request for "judicial notice" at page 13 footnote 10, Cross-Petitioner apparently asserts that the State's jurisdictional prerogatives are enhanced by the fact that the Sycuan Indian Reservation was established by a post-statehood Executive

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8. *See, e.g., National Indian Gaming Commission v. Lummi Indian Business Council*, No. Indian 94-1, June 9, 1995 (NIGC Notice of Violation sustained by administrative law judge and NIGC chairman).

Order, rather than by a reservation in the Act of Admission. This Court long ago rejected such a distinction. *See United States v. McGowan*, 302 U.S. 535, 538-39 (1938). *See also, Arizona v. California*, 373 U.S. 546, 597 (1963), *decree entered*, 376 U.S. 340 (1964) (a post-Statehood executive order creating Reservations in California effected the reservation of federally-protected *Winters* water rights to the beneficiary Tribes).[9]

6. Cross-Petitioner at page 13 misstates the law in arguing that this Court should apply a balancing test in the area of regulation of Indian gaming. This request ignores (1) that Congress expressly preempted the field and admonished the federal courts against balancing of interests, Sen. Rep. No. 100-446, 1988 U.S.C.C.A.N., 100th Cong., 2d Sess., 3076, 3105, and (2) independent of actual games, the Tribes and the federal government have paramount interests in precluding State jurisdiction except through compact negotiation process; the State's desire to acquire jurisdiction that it would not otherwise have in the absence of IGRA (*see California v. Cabazon*) is the incentive to negotiate compacts. *See* Senate Report No. 100-446, *supra*, at 3075-76.

7. At page 13 footnote 11, Cross-Petitioner disregards the record when he states: "If the Tribes had harbored any genuine doubts about whether these machines constituted class III gaming, the Tribes could have brought an action against the San Diego County Sheriff for a declaration as to their status." Apart from the fact that Sycuan genuinely believed — and continues to

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9. In *Arnett v. 5 Gill Nets*, 48 Cal. App. 3d 454 (1975), and in *People v. McCovey*, 36 Cal. 3d 517 (1984), the California Court of Appeal and the California Supreme Court both rejected the jurisdictional significance of the fact that reservations were created after statehood. If that fact lacks significance in a natural resource context, it clearly lacks significance in the context of allocating jurisdiction over Indians and Indian country. Otherwise, P.L. 280 itself would have been unnecessary, and perhaps unconstitutional.

believe — that the dispensers are Class II,[10] the record before the District Court reflects that Sycuan relied on a business license issued by Los Angeles County to the vendor of the seized Autotab 101 dispensers. Sycuan Pet. at App. K-8. Sycuan consulted the U.S. Attorney before installing the machines, *id.*, and in good faith tried to engage the State law enforcement authorities in a government-to-government dialogue. *Id.* at App. K-9. Sycuan had no reason to seek declaratory relief until the local sheriff took unilateral action.

8. Cross-Petitioner incorrectly contends at page 7 that the Court of Appeals "did not opine upon the compatibility" of IGRA with P.L. 280. Citing *United Keetoowah Band*, 927 F.2d 1170 (10th Cir. 1991), the Court of Appeals specifically held:

> If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d).... Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the Sate's laws prohibiting "slot machines" the exclusive province of the federal government.

Sycuan Pet. at App. A-11 to A-12.

9. Cross-Petitioner's request at footnote 15 for judicial notice of pleadings in the *Soboba* case is grossly misleading. Cross-Petitioner continues his misplaced reliance on Penal Code sections 330 *et seq.*, ignores the ruling of *Western Telcon, supra,* and mischaracterizes the substance of the *Soboba* bad faith lawsuit, *viz.*, that despite a contractual (and IGRA) obligation to

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10. *See supra,* note 1.

do so,[11] the State would not even agree to meet with the Tribe, let alone negotiate over either the scope of games *or* non-litigated regulatory provisions. The State erected spurious preconditions even to the negotiation of simulcast compact terms previously approved by the State.[12] The proliferation of litigation results not from any inadequacy of the *Cabazon* standard, but from the State's persistent refusal to recognize the status of Tribes as governments, and Tribal rights under IGRA.

10. In footnote 18, Cross-Petitioner inappropriately asks the Court to take judicial notice of newspaper reports of the actions of United States Attorneys, and inaccurately describes the terms of the standstill agreement between the San Diego U.S. Attorney and three Tribes.[13] The State would prefer the U.S. Attorney to close down Indian gaming and thereby reward the State for refusing to negotiate Tribal-State compacts in good faith.

11. Cross-Petitioner's footnote 19 is a transparent attempt to prejudice the Court by dredging up dated events which, ironically, demonstrate how closely the Tribes work with the federal authorities. Apart from the inappropriate request that the Court judicially notice various newspaper articles based on counsel's own press releases, the proffered "facts" are spurious.

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11. *Rumsey* was litigated pursuant to a Litigation Agreement executed by the State of California and numerous Tribes, including Sycuan and the Soboba Band. The agreement obligated the State to negotiate any games held permissible by the district court, even pending any appeal. The State refused to do so, thereby breaching its agreement.

12. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

13. In his apparent attempt to slander the U.S. Attorney, Cross-Petitioner fails to note that the Rincon Band's claim of unfair treatment did not stop the U.S. Attorney from shutting down Rincon's gaming operation. *See United States v. Rincon Band of Mission Indians*, S.D. Cal. No. 95-557 (1995).

The attempted Rincon infiltration took place eight years ago (not in the 1995 case cited by Cross-Petitioner), and was reported *by the Tribe*. The resulting federal prosecution was successful.[14] Cross-Petitioner's references to unsubstantiated news reports about violence is reprehensible; such violence either did not happen as reported, or did not occur in the casinos or involve the gaming activity. More to the point, the presence or absence of Class III gaming, or State or federal jurisdiction, has nothing to do with any such disputes, and State jurisdiction would not prevent them. When federal authorities believe there is a problem warranting federal action, they have demonstrated that they know what to do about it.[15] Moreover, the State has jurisdiction under P.L. 280 to prosecute for assault and battery.

12. At page 22, Cross-Petitioner incorrectly asserts that Sycuan has no jurisdiction to regulate "slot machine" gaming (whatever "slot machines" may be). Even if the Johnson Act, 15 U.S.C. § 1171, *et seq.*, could be construed to divest the Band of the power to *authorize* slot machines on its Reservation, it did not divest the Band of the power to preclude their use. Indeed, IGRA specifically preserves the inherent power of Tribes to render Class III gaming illegal on Indian lands with or without a compact. *See* 25 U.S.C. §§ 2710(d)(1)(D)(i), 2713(d).

JURISDICTION OF THE COURTS BELOW

The Sycuan Band invoked the District Court's original jurisdiction under 28 U.S.C. §§ 1331, 1343, 1337 and 1362,

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14. As it did in *Cabazon v. California*, the State continues to beat the drum of organized crime "infiltration", but has no more evidence of such infiltration now than it had then.

15. *See, e.g., United States v. Rincon Band of Mission Indians*, S.D. Cal. No. 95-557 (1995); *United States v. E.C. Investments, Inc.*, No. CR-94-361-RG (C.D. Cal.), *app. pending*, No. 94-5063 (9th Cir.).

alleging claims arising under 42 U.S.C. § 1983 and 25 U.S.C. § 2701, *et seq.* ("IGRA"). The District Court found that Sycuan's claims concerning the extent to which the County of San Diego had jurisdiction to enforce California's gaming laws on the Sycuan Reservation, and Sycuan's claims concerning the status of certain gaming equipment as permissible "computer, electronic or technologic aids" to the Class II game of pulltab, arose under the laws of the United States within the meaning of 28 U.S.C. § 1331. Because the District Court ruled against Sycuan on its claims regarding the classification of the dispensers, the District Court did not have to decide whether it also had jurisdiction under 28 U.S.C. § 1343, and in fact did not make such a determination.

The District Attorney filed an interlocutory notice of appeal from the District Court's grant of provisional injunctive relief. That appeal later was abandoned and dismissed.

Both the District Court and the Court of Appeals rejected the District Attorney's contention that the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), compelled dismissal of the action.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE CONTROLLING DECISIONS OF THIS COURT, THE EXPRESS LANGUAGE AND INTENT OF IGRA, AND ALL JURISDICTIONAL STATUTES.

In 1987, this Court held in *California v. Cabazon, supra*, that Public Law 280 had not conferred upon California authorities

jurisdiction to enforce State and County bingo and card gambling laws in Indian country. The Court held that those laws merely regulated such gaming activity, while P.L. 280 granted the State jurisdiction only to enforce laws that criminally prohibit conduct as a matter of public policy.

In 1988, Congress enacted IGRA, 25 U.S.C. § 2701, *et seq.*, in part to codify this Court's decision in *Cabazon*[16] so that Tribes located in States that do not criminally prohibit virtually all forms of gaming as a matter of public policy would be able to utilize gaming for governmental purposes free from harassment and interference by State or local authorities. *See United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss*, 927 F.2d 1170, 1176-81 (10th Cir. 1991); Sen. Rep. No. 100-446, 1988 U.S.C.C.A.N., 100th Cong., 2d Sess. 3071.

The first ground for the decision of the Court of Appeals was that under *California v. Cabazon, supra*, California regulates gaming in general, rather than criminally prohibiting such activity as a matter of public policy, and thus that California does not have jurisdiction under P.L. 280 to enforce the laws at issue. The soundness of this conclusion has been validated as a matter of California law by the recent decision of the California Court of Appeal in *Western Telcon, Inc. v. Calif. State Lottery, supra.*

The Court of Appeals also ruled that to the extent that the State ever might have had jurisdiction under P.L. 280 to enforce the laws at issue, that grant of jurisdiction impliedly was repealed by IGRA's allocation to the United States of *exclusive* jurisdiction to enforce state gambling laws in Indian country if such activity does not constitute Class I gaming, Class II gaming, or Class III gaming that is authorized by a Tribal-State compact. Sycuan Pet. at App. A-11.

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16. *See* 25 U.S.C. § 2701(5).

A central component of IGRA is 18 U.S.C. § 1166, which provides:

> Subject to subsection (c), all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

Section 1166(b) makes the violation of the State laws extended to Indian country by section 1166(a) punishable in the same manner as provided by State law.[17]

However, 18 U.S.C. § 1166(d) provides:

> *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws* that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior . . ., or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Id. (emphasis added). The Court of Appeals correctly construed

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17. 18 U.S.C. § 1166(c) excludes from the definition of "gambling," "(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect."

18 U.S.C. § 1166(d) as a "highly explicit limitation on [State] jurisdiction to enforce" the State laws assimilated into federal law by § 1166(a), (b) and (c). Sycuan Pet. at App. A-8. Moreover,

> The Bands have not consented to the transfer of criminal jurisdiction to the State. As far as IGRA is concerned, therefore, the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming.

Id.

This conclusion by the Court of Appeals, based on the plain language of IGRA, is manifestly correct, and is completely consistent with the decisions of every other Court of Appeals that has considered this question. *See, e.g., United Keetoowah Band, supra; Seneca-Cayuga Tribe v. Oklahoma, ex rel. Thompson,* 874 F.2d 709 (10th Cir. 1989); *Lac du Flambeau Band of Lake Superior Chippewa Tribes v. Wisconsin,* 957 F.2d 515 (7th Cir. 1992), *dismissing appeal from* 743 F. Supp. 645, 648 (D. Wisc. 1990) (IGRA "established a comprehensive scheme for the regulation of gaming on Indian lands"); *Sisseton-Wahpeton Sioux Tribe v. United States Department of Justice,* 718 F. Supp. 755 (D.S.D. 1989), *rev'd on other grounds,* 897 F.2d 358 (8th Cir. 1990) ("IGRA is a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming").

Cross-Petitioner's contention that the Court of Appeals "did not opine upon the compatibility" of IGRA with 18 U.S.C. § 1162 (P.L. 280) is incorrect. Citing *United Keetoowah Band, supra,* the Court of Appeals specifically held that,

> If that exclusivity is incompatible with any

> provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d) .... Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the State's laws prohibiting "slot machines" the exclusive province of the federal government.

Sycuan Pet. at App. A-11 to A-12.[18] Again, this conclusion is manifestly correct based on the plain language of IGRA and this Court's approach to implied repeals.

Under the Court of Appeals' correct analysis, whether a particular Class III gaming activity is merely regulated by State law, or is criminally prohibited by state public policy, may be relevant to the scope of gaming that may be included in a Tribal-State compact; yet it is utterly without significance in determining whether a State has jurisdiction over the activity in the absence of a compact. In either event, jurisdiction to enforce the State laws allegedly violated by the activity rests exclusively with the United States.

If the plain language of 18 U.S.C. section 1166(d) does not suffice to demonstrate that the Court of Appeals properly determined that IGRA vests jurisdiction to enforce State gambling laws in Indian country exclusively in the United States, consideration of the practical effects of a contrary determination — as illustrated by this case — would compel the same result. In this case, the Attorney General of California disregarded clear

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18. As noted above, contrary to Cross-Petitioner's repeated contention, California does not "categorically prohibit" slot machines, or "prohibit" slot machines at all. *See Western Telcon, Inc. v. Calif. State Lottery, supra.*

and controlling judicial and congressional directives[19] and unilaterally decided that California had jurisdiction under P.L. 280 to seize gaming equipment if local authorities determined that the equipment constituted "slot machines" under State law. He urged local authorities to raid Reservations, seize offending equipment and arrest and prosecute those involved in operating the equipment in Indian country. Sycuan Pet. at App. K-9.

Hoping for a government-to-government dialogue as contemplated in IGRA, Sycuan requested meetings with California's law enforcement authorities to explain the Band's position on both the general jurisdictional issue and the specific matter of the legal status of the Autotab Model 101 electronic pulltab dispenser.[20] Sycuan's requests were ignored. Sycuan Pet. at App. K-9.

San Diego County acted as the Attorney General had urged. Ignoring Sycuan's request to meet and attempt to resolve the dispute in a manner respecting the sovereignty of both parties, early on the morning of October 30, 1991, a force of more than eighty San Diego County Sheriff deputies mounted surprise raids on the gaming facilities of the Sycuan, Viejas and Barona Bands of Mission Indians. In those raids, Sheriff's deputies seized equipment, cash and records, and the District Attorney initiated criminal prosecutions against persons believed to be involved in operating the equipment.[21]

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19. *E.g. United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991); *see also*, Sen. Rep. No. 100-446, 1988 U.S.CC.A.N., 100th Cong., 2d Sess., 3071-72, 3075-76, 3105.

20. When the Sycuan Band acquired the Autotab Model 101 electronic pulltab dispensers, the vendor was licensed by Los Angeles County to sell and service the equipment for charity bingo facilities in that County. Sycuan Pet. at App. K-8.

21. At the Sycuan Reservation, the District Attorney cited Sycuan's business manager, who was not the manager of the gaming facility.

To reverse the jurisdictional decision of the Court of Appeals would destroy the jurisdictional foundation of IGRA and repudiate the principles of *California v. Cabazon*. The bargaining power of States would be immeasurably strengthened, and that of Tribes grievously weakened: Any State or local law enforcement agency or individual police officer would be able — at its sole discretion — to stop a Tribe from engaging even in Class II gaming[22] by summarily seizing equipment, cash and records, arresting and initiating prosecutions of Tribal officials and employees and, in effect, completely disrupting or even forcing the closure of a Tribal gaming facility. Although the legality of such actions could be challenged after the fact, during the pendency of judicial proceedings the Tribal government would lose the revenues that IGRA contemplates it should have to support its functions and programs, Tribal members would lose the employment opportunities that IGRA intended to confer through Tribal gaming, and the entire Reservation community would be deprived of the economic benefits that Congress intended should be available to Reservation communities through Tribal governmental gaming. In short, Tribal governmental gaming could exist only at the sufferance of State and local non-Indian authorities.

Congress intended that compacts negotiated between Tribes and States as equals be the *only* means by which States could acquire jurisdiction over on-Reservation Class III gaming. Indeed, Congress viewed the opportunity for States to acquire such jurisdiction as the primary incentive to State participation in the compact-negotiation process. *See* Sen. Rep. No. 100-446, *supra*, at 3075-76. Construing IGRA as recognizing concurrent State jurisdiction over on-Reservation gaming in the absence of an approved Tribal-State Class III compact would completely undermine that process by eliminating that incentive.

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22. A result expressly proscribed by Congress. Sen. Rep. No. 100-446, *supra*, at 3076, 3104-05.

Given the historic enmity between Tribes and States in general, and the State of California and Indian Tribes in that State in particular,[23] the Court of Appeals correctly decided that Congress properly reserved to federal authorities the exclusive power to initiate and maintain criminal prosecutions of persons accused of violating State gambling laws in Indian country.

II.

THE COURT OF APPEALS CORRECTLY REJECTED AN ARTIFICIAL DISTINCTION BETWEEN THE TRIBE AND ITS AGENTS FOR JURISDICTIONAL PURPOSES.

Cross-Petitioner contends that the non-Indian status of at least some of the persons cited by County authorities is of jurisdictional significance. This argument is contrary to this Court's well-established jurisdictional principles, and ignores IGRA's clear contemplation that Tribes will employ non-Indians in the operation of their gaming facilities. In numerous modern cases, this Court repeatedly has held that States lack jurisdiction over non-Indians in Indian country when such jurisdiction has been preempted by federal law, whether or not a specific statute expressly states its preemptive effect. *See, e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983) (State enjoined from enforcing fish and game laws against non-Indians licensed by Tribe to take game on Reservation; injunction extended to interfering with off-Reservation possession of game lawfully taken on-Reservation); *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982) (state gross receipts tax on non-

23. This case illustrates that enmity. *See also, Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977) in which County authorities attempted to prevent an Indian family living in a converted chicken coop from moving into a federally-subsidized mobilehome because County zoning laws prohibited mobilehomes in the area in which the Reservation is located.

Indian contractors building school on Reservation preempted); *Central Machinery Co. v. Arizona State Tax Comm'n.*, 448 U.S. 160 (1980) (mere existence of Indian Trader statute preempted State taxation of unlicensed off-Reservation seller of equipment to on-Reservation purchaser).

In *California v. Cabazon, supra,* this Court compellingly refuted Cross-Petitioner's contention. In *Cabazon,* the Morongo Band's bingo enterprise was managed by a non-Indian company, and most of the Band's patrons were non-Indians. Nonetheless, this Court upheld the Ninth Circuit's decision that State and County laws were preempted and thus could not be enforced against such activities in Indian country, because, *inter alia,* federal and Tribal interests in Tribal self-governance and Reservation economic self-sufficiency outweighed relevant State interests. In the instant case, unlike *California v. Cabazon,* there is a specific and comprehensive federal statutory regulatory scheme that explicitly allocates jurisdiction and fully protects any legitimate State interests, leaving no room for State jurisdiction except in accordance with that scheme. *See, e.g., Warren Trading Post v. Ariz. State Tax Comm'n.*, 380 U.S. 685 (1965).

IGRA itself, in 25 U.S.C. § 2711, clearly contemplates that non-Indians may be involved in the operation of Tribal gaming facilities. Under that provision, the National Indian Gaming Commission must approve contracts between Tribes and management companies, and all persons with significant gaming responsibilities or authority are subject to rigorous background investigations. Under Cross-Petitioner's jurisdictional premise, an NIGC-approved non-Indian management contractor would have no protection against arrest, prosecution and conviction by State authorities or the local sheriff for performing the very duties authorized by Congress and the approved contract. Such a contractor would have to assert federal approval as a *defense* to

state prosecution, effectively chilling such activity and eviscerating IGRA as a Tribal economic development tool.

III.

THERE IS NO NEED TO RELITIGATE OR CLARIFY THIS COURT'S DETERMINATION IN *CABAZON* THAT CALIFORNIA'S PUBLIC POLICY IS TO REGULATE, NOT PROHIBIT, GAMING FOR THE PURPOSES OF DETERMINING THE EXTENT OF THE STATE'S JURISDICTION TO ENFORCE ITS GAMING LAWS IN INDIAN COUNTRY SUBSEQUENT TO PASSAGE OF IGRA.

Given that California regulates, rather than prohibits, gambling in general, *California v. Cabazon, supra,*[24] Sycuan clearly had sovereignty to regulate gambling within its boundaries even before passage of IGRA. Given also that Congress intended that States and Tribes should negotiate government-to-government compacts for the authorization and regulation of Class III gaming, it is the State's unilateral usurpation of authority over on-Reservation activities, and not Tribal regulation or operation of those activities, that defies Congressional intent and frustrates IGRA's purposes.

That there is litigation between States and Tribes about the extent of State jurisdiction in general is not attributable to this Court's "public policy" test in *Cabazon,* but to State aggression and an unwillingness to recognize and deal with Tribes as

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24. As illustrated by the decision in *Western Telcon, supra,* California has considerably expanded the scope of lawful gaming since *Cabazon* was decided. The State Lottery now operates an on-line, computerized, State-banked (rather than parimutuel) keno game. The same court held that the State Lottery is authorized to offer what California defines as "slot machines," as well as banked games.

sovereign governments. The weapons in that battle may have shifted from bullets to legal briefs, but in virtually every instance, including the non-gaming cases cited by Cross-Petitioner, Tribes have been forced to litigate to protect themselves, their territory and/or their members from State incursions.[25]

Even the IGRA litigation to which Cross-Petitioner refers is not attributable to *Cabazon's* "public policy" test, but to the State's resistance to IGRA's basic tenets; *i.e.*, that Tribes are governments, rather than private, for-profit entities subject to inherent State jurisdiction; that Tribes legitimately may use gaming to raise acutely-needed revenues to fund their programs, employ their people and create economic self-sufficiency for their communities; and that Tribes can offer a broad scope of gaming to offset the absence of a tax base, and remote locations that have prevented other forms of economic development.

The State's inability to persuade federal authorities to take action against what the State perceives to be uncompacted Class III Tribal gaming is not a reason for granting the Cross-Petition. First, the status of the gaming equipment that the Sheriff seized in this case remains the subject of litigation, as evidenced by the absence of a final judgment and the Band's pending Petition for Writ of Certiorari in this case. Second, under IGRA and the Johnson Act federal authorities have ample power to take whatever measures they deem necessary to protect the public; that they choose to exercise their authority in the context of the unique federal-Tribal relationship, informed by the State's stonewalling and subversion of the compact negotiation process,[26] is not an argument for destroying the delicate and

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25. In the instant case, the armed incursion by dozens of sheriff's deputies easily could have escalated into a serious confrontation, but for Sycuan's restraint.

26. *See, e.g., Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (1995), *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *pet. for cert. pending*.

comprehensive statutory scheme that Congress has created in IGRA.

IV.

THERE IS NO DOUBT THAT SYCUAN'S COMPLAINT CLEARLY PRESENTED AN ACTUAL CASE OR CONTROVERSY.

The Court of Appeals had no difficulty finding a case or controversy and jurisdiction over Sycuan's claims. Sycuan Pet. at App. A-7 to A-8. Cross-Petitioner's attempt to distinguish this case from the situation in *New Mexico v. Mescalero Apache Tribe, supra,* suffers from numerous fatal flaws. First, according to *Western Telcon,* the California Lottery may use what California law defines as "slot machines" in the operation of its keno game; therefore, there is no support in California law for Cross-Petitioner's assertion at page 21 that "slot machine gambling is prohibited as a matter of state law."

Second, California law specifically allows the use of what California law defines as "slot machines." *See* Pen. Code §§ 326.5(o), 330c.

Third, Cross-Petitioner's assertion that the Sycuan Band has no jurisdiction to regulate "slot machine" gaming — whatever "slot machines" may be[27] — simply is wrong as a matter of federal

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27. As noted above, Sycuan has consistently disputed, and the District Court never found, that the seized dispensers are "slot machines." Cross-Petitioner uses that term extremely loosely, based upon the expansive definition of "slot machine" under California law. Although the definition of "slot machine" may have significance in determining the scope of Class III gaming for which a State is obligated to negotiate under IGRA, it clearly has no significance in the allocation of criminal jurisdiction between the State and the United States under IGRA.

law. Even if the Johnson Act, 15 U.S.C. § 1171, *et seq.*, could be construed to divest Sycuan of the power to *authorize* slot machines on its Reservation, it did not divest the Band of the power to preclude their use. IGRA specifically acknowledges the inherent power of Tribes to render Class III gaming illegal on Indian lands with or without a compact. *See* 25 U.S.C. §§ 2710(d)(1)(D)(i), 2713(d).

Finally, and more fundamentally, the real question presented by the Cross-Petition (and already answered by this Court and others) is not whether particular equipment is Class II or Class III,[28] but whether the State has the authority to make and enforce that determination unilaterally and without resort to either IGRA's compacting process or a forum that respects the Tribe's governmental status. It would be difficult to imagine a more immediate or serious case or controversy than a dispute over the State's jurisdiction to invade a Tribe's Reservation, halt *all* gaming activity during the execution of an invalid State court search warrant that results in the seizure of Tribal funds and records, and then prosecute Tribal employees for doing their Tribally- and federally-approved jobs.[29]

When the sheriff's invasion force arrived, the Band had two options: (1) physically resist the *ultra vires* actions of the officers; or (2) avoid a confrontation and seek recourse in the United States District Court. If this Court were to rule that the Band's complaint failed to allege a cognizable case or controversy, the Band would be deprived of its second option, substantially increasing the risk of violent conflicts between Tribes protecting the economic lifeblood of their Reservations,

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28. That is the issue presented by Sycuan's pending Petition for Writ of Certiorari.

29. In the case of the prosecution of Sycuan's business manager, he was not even responsible for the operation of Sycuan's gaming facility.

and hostile State authorities intent upon destroying Tribal self-sufficiency.

V.

THIS ACTION IS NOT BARRED BY 28 U.S.C. § 2283.

Cross-Petitioner does not overcome the obvious federal interest in, and plain jurisdictional basis for, the District Court's enforcement of IGRA and the ouster of State jurisdiction by way of the court's injunctive power. He also disregards the other major component of this action, namely the *declaratory judgment* in favor of Sycuan. 28 U.S.C. § 2202 leaves no doubt that if the State failed to comply with the terms of such declaratory relief, Sycuan could then obtain an injunction to enforce those terms. *See, e.g., Doe v. Gullinot,* 657 F.2d 1017 (9th Cir. 1981). Cross-Petitioner's argument that the action is barred by 28 U.S.C. § 2283 is frivolous.

VI.

YOUNGER V. HARRIS IS NOT A BAR TO THIS ACTION.

Cross-Petitioner premises his *Younger v. Harris* argument on his continuing error that the State has jurisdiction to prosecute "slot machine" gambling on Indian lands. This position is frivolous, and Cross-Petitioner offers no indication that the analysis of the Court of Appeals is erroneous. He also forgets that this action is as much about the seizure of equipment, cash, and records as it is about prosecution of individuals. Finally, because this case involves fundamental federal issues of Tribal sovereignty, *Younger v. Harris* simply has no application. *See, e.g., Moe v. Confederated Tribes,* 425 U.S. 463, 470-75 (1976).

CONCLUSION

The decision of the Court of Appeals is completely consistent with the controlling precedents of this Court, as well as with IGRA. The Cross-Petition offers no special or important reason for review. For the reasons set forth above, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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